In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1009

JOHN N. FLOOD AND CATHERINE FLOOD, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the Tax Court (Pet. App. B, pp. 33-56) is not reported and the opinion of the court of appeals (Pet. App. A, pp. 31-32) is reported at 468 F. 2d 904.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1972. The petition for a writ of certiorari was filed on January 18, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Tax Court was correct in declining to reopen stipulated decisions determining petitioners' tax liabilities which had become final seven years earlier.

STATUTES INVOLVED

The pertinent portions of Sections 7481(1) and 7483 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, p. 7.

STATEMENT

Petitioner[1] during the early 1950's was engaged in the sale of mobile homes on time payment plans. (II-R. 17, 39.)[2] Notes taken in payment were sold by petitioner to finance companies at a discount. The finance companies ordinarily held back a portion of the sale price of the notes for a period of time to insure against possible defaults on the notes. The withheld amounts were credited to petitioner in so-called "dealer reserves." Petitioner did not consider the dealer reserves as being taxable to him at the time they were credited to him on the finance companies' books, but only at the later time when, and to the extent that, the unused portion was released to him. There was at that time a split of opinions among the courts of appeals as to when these sums were taxable. In 1959, however, this Court, in *Commissioner* v. *Hansen*, 360 U.S. 446, held that the sums were taxable when credited.

Prior to the *Hansen* decision, petitioner had engaged a tax attorney, Charles Prieve (Prieve) to represent him

---

[1] Petitioners are husband and wife who filed joint federal income tax returns for most of the years in issue. As it is the activities of the husband alone with which this petition is concerned, he alone is referred to as petitioner.

[2] "I-R." and "II-R." references are to the two-volume record on appeal in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

in his tax difficulties.[3] Petitioner granted a broad general power of attorney to Prieve. While represented by Prieve, petitioner signed an election to be taxed on his dealer reserve income under provisions of the Dealer Reserve Income Adjustment Act of 1960, P.L. 86-459, 74 Stat. 124, which had been enacted to provide certain relief to taxpayers affected by the *Hansen* decision. Following this election, Prieve, sometime prior to March, 1962, reached a settlement agreement with the Commissioner in regard to petitioner's total tax liabilities. (II-R. 60.) On June 7, 1962, and June 14, 1962, the Tax Court entered stipulated decisions determining petitioner's liabilities for income taxes and penalties for 1951, 1952, 1953 and 1954. (I-R. 41-43.) No appeal was taken from these decisions, which, under the provisions of Sections 7481 and 7483 of the Internal Revenue Code, thereby became final in September, 1962.

Nearly seven years later, on July 8, 1969, petitioner filed with the Tax Court a motion for leave to file a motion to vacate these decisions. The motion to vacate, which petitioner lodged with the court, was based on the claim that the earlier decisions had been obtained by "fraud on the court." (I-R. 44.) After a hearing was held the Tax Court denied these motions (I-R. 61-64); this denial was vacated, however, when the court became aware that petitioner had not received notification of the hearing (I-R. 102). A second hearing was then held at which petitioner and Prieve testified concerning the entry of the

---

[3] Petitioner had not filed returns for 1951 and 1952 until 1957. In addition to disputes over the treatment of dealer reserves, there were also issues for 1951 through 1954 concerning net operating loss carryovers, valuation of inventories, the penalties for failure to file returns and declarations of estimated tax, and negligence penalties.

original decisions. After analysis of the testimony and evidence, the Tax Court denied petitioner's motions, finding that no showing had been made that the earlier decisions had been procured by "fraud on the court" or in any other improper manner. (Pet. App. B.) The court of appeals affirmed this finding. (Pet. App. A, pp. 31-32.)

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review of the Tax Court's factual determination.

The finality provisions of the Internal Revenue Code of 1954 with respect to Tax Court decisions (Secs. 7481 and 7483, Appendix, *infra*) have always been very strictly construed. This Court has held that an appellate court may not reopen such a decision once it has become final under the statutory provision. *Helvering* v. *Northern Coal Co.*, 293 U.S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225. Several circuit courts, however, have recently held, relying on this Court's opinion in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, that when a Tax Court decision has been procured by fraud on the court, it is not a decision within the meaning of the statute and therefore cannot be final. *Kenner* v. *Commissioner*, 387 F. 2d 689 (C.A. 7); *Toscano* v. *Commissioner*, 441 F. 2d 930 (C.A. 9). In the present case, however, the courts below found no evidence which would support a factual finding that fraud had occurred. There is no reason for this Court to review a factual finding concurred in by the trial court and the court of appeals. See, *e.g.*, *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

All of petitioner's allegations of fraud and other errors are solely designed to show that the stipulated 1962 decisions charged him with excessive deficiencies in that

they treated as income to him in the years so credited the entire amounts credited to his dealer reserves by finance companies, regardless of whether or not these amounts were ever actually received by him. As recognized by the court of appeals (Pet. App. A, pp. 31-32), this stipulation was entered into by his attorney in recognition of the mandate of this Court in *Commissioner* v. *Hansen,* 360 U.S. 446, which was handed down while petitioner's case was pending before the Tax Court. Until this Court overrules that decision, no other result could be reached than that stipulated to by petitioner's counsel.

Petitioner now seems to allege additionally (Pet. 26, 27) that he had included the dealer reserves in his original returns for the years in question and that he is being taxed twice on the same amounts. This contention, which we believe to be incorrect, is raised for the first time in this Court and is inconsistent with the entire tenor of his complaint in the courts below to the effect that he was not required to report the dealer reserves as income in the year credited to his reserve account, but only when actually released by the finance company and paid over to him.[4]

Finally, with respect to petitioner's charge that the Tax Court's disposition relied upon a power of attorney never introduced into evidence, there was testimony (II-R. 78-80) concerning the powers granted by this instrument. While the power of attorney was not introduced into evidence in the Tax Court because not then available,

---

[4]In the court of appeals petitioner stated (Br. 4) that the dealer reserves were not included in income "until received by the petitioners," and that he "followed the practice of reporting dealer reserve income in the year in which it was received" (Br. 5).

it was later located and, for the information of the court of appeals, reproduced in the appendix to respondent's brief in the court of appeals. Petitioner has never challenged the authenticity of the document as there reproduced. Moreover, to the extent that the scope of the granted power of attorney was relevant to his case, petitioner had the burden of proof in the Tax Court[5] of showing fraud or other wrongdoing, and of discrediting the testimony as to the power of attorney, and the consequences of the failure to produce the document in question must rest upon him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
WILLIAM A. FRIEDLANDER,
MARY J. MCGINN,
Attorneys.

---

[5] "[T]here is a heavy burden both of particularized pleading and of proof upon the one who seeks to impeach an order or decree of a court." *Kenner* v. *Commissioner*, 387 F. 2d 689, 691 (C.A. 7).

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1964 ed.):

Sec. 7481. Date When Tax Court Decision Becomes Final.

The decision of the Tax Court shall become final—

(1) *Timely petition for review not filed.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

* * * * *

Sec. 7483. Petition For Review

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.